—— IN THE ——

Supreme Court of the United States,

OCTOBER TERM, 1903.

CITY OF JOPLIN, Appellant,
vs.
SOUTHWEST MISSOURI LIGHT COMPANY, Respondent.

No. 32.

Reply of Appellant.

An examination of respondent's brief, discloses a number of errors in the statement of evidence, and what the evidence establishes. These errors might be taken for facts if they are permitted to pass unchallenged. We desire also in this reply to question

the soundness of some of the legal propositions to be found therein.

No Implied Contract Necessary.

Respondent contends that inasmuch as the ordinance contained no contract prohibiting the city from engaging in commercial lighting, such a contract should be written into the ordinance by implication.

Appellant contends, that no implied contract is necessary or even permitted, because the contract is complete, unambiguous. and makes express provision for everything contemplated by the contracting parties.

The grant in the ordinance authorizes respondent's assignee, subject to certain limitations, to erect a plant within the city and its additions, to generate electricity, and to vend such electricity there generated, within such city and its additions, and it is not claimed that any one is interfering with or threatening to interfere with this privilege.

Respondent is not only in the enjoyment of everything granted, but more for it is vending electricity in appellant city, and its additions, generated at a plant located at Grand Falls, miles beyond the appellant city, and its additions, and beyond even the County in which appellant city in located.

No Provision In Ordinance 441 for Street Lights.

No provision was made in Ordinance No. 441 or elsewhere for street lights for the city during the life of the franchise. If Ordinance

441 had made provision for all such lights which the city might need during that period, then a clause that the city would not during that time erect its own plant would not have been unreasonable. But for the city without such arrangement to have contracted not to build its own plant without satisfactory arrangements to obtain such lights from private sources would certainly have been very unbusiness like. It may be urged that no objection is made to the city operating its plant to light its own streets. Our answer to this is, that it is not a business proposition to operate water works for hydrant rental alone, neither is it a business proposition,to operate an electric light plant, for street lights alone. It is a matter of common knowledge that it is necessary to lay many miles of mains and erect many miles of wire and keep them in repair to reach and supply the hydrants and street lights. The same wires that supply the street lights, would also supply stores, factories and other business enterprises with arc lights located on the lines of wire between such street lights and many more lights could be supplied with the same wires and poles and repairs by doing commercial lighting, than if the plant was confined to street lighting alone. Neither private individuals nor private corporations build plants to supply fire hydrants and street lights alone, and it is not a business proposition for a city to erect such a plant for street lighting alone. If respondent's assignors had asked for a clause in the ordinance prohibiting appellant city from doing anything but street lighting when the ordinance was under consideration, it would certainly have been refused, and if insisted upon, the franchise would not have been granted.

Certainly then, it would be unjust at this time to write such a contract into the ordinance by implication, when the city has no power to refuse the franchise by reason of it.

Appellant Required to Furnish No Lights To The Citizens of Appellant City.

It would also be unjust to bind the city by such implied agreement because the ordinance relied on is not mutual; it requires respondent to furnishes no lights to the citizens of appellant city. True the ordinance fixes the maximum charge for commercial lights, but it does not require any to be furnished, and provides for no forfeiture in case they are not furnished.

If respondent should be finally successful in this proceeding, it would be within its power to refuse to adequately supply the demand for commercial lighting within appellant city, and at the same time have rendered the city powerless to supply such demand. The provisions in the ordinance for the removal of poles, masts and towers not used, does not answer the difficulty. The respondent might use the poles, masts and towers to furnish heat or power or both, and furnish no lights at all until such time as appellant city would comply with any terms respondent might dictate even to an extension of franchise. Such a condition would be extremely burdensome, because electric lights are no longer considered luxuries they are considered at this time as necessary as sidewalks and sewers. The city might induce some other company to erect works but

for the fact that it is difficult to induce capital to enter a field already occupied.

Nearly all, if not all the cases where the courts have sustained express contracts prohibiting cities from entering the commercial field in competition with water and lighting companies, the ordinances have contained provisions requiring the furnishing of everything needed during the time the city was so excluded.

The case of Walla Walla vs. Walla Walla Water Company, 172 U S 1, (hereafter called the Walla Walla Case) much relied on by respondent, contains such a provision, and also a provision for forfeiture if the company failed to comply with it; but as already seen the ordinance relied on in this case, Ordinance No. 441, requires the furnishing of no lights either to the city or its citizens. Then is it reasonable to contend that the parties intended that the City should do such an unreasonable thing as to render the city powerless to supply lights to the citizens without at the same time making adequate arrangements for such supply from some other source?

Without Such An Agreement Ordinance 441 Would Create a Monopoly.

If it had been intended to prohibit the city from supplying lights, to its citizens, would not some provision have been made, in the ordinance empowering the city to buy the works of the respondent during the franchise? In the Walla Walla case, (supra), upon which respondent seems to place much reliance, the ordinance contained such a provision. Mr. Justice Brown speaking for the court at page 17, (par. 6) said:

"Nor do we think the contract objectionable in its stipulation that the city would not erect waterworks of its own during the life of the contract. There was no attempt made to create a monopoly by granting an exclusive right to this company, and the agreement that the city would not erect waterworks of its own was accompanied, in section 8 of the contract, with a reservation of a right to take, condemn, and pay for the waterworks of the company at any time during the existence of the contract."

If no monopoly would be created when a right to buy or condemn was reserved in the ordinance, would not the converse of this proposition logically follow; that without such right to condemn or buy reserved in the ordinance a monopoly would be created that is conceding respondent's contention to be correct? We have been able to find no law authorizing a city of the third class such as Joplin is, to condemn the plant and property of a light company and we are satisfied that no such law exists.

A Perpetual Franchise or Monopoly Must be Expressly Granted, Cannot be Implied.

Respondent's solicitors on page 6 of their brief cite the case of Detroit Citizens St. R. R. Co. vs. Detroit R. Co. 171 U. S. 48. This decision in our judgment not only does not sustain respondent's position, but is if applicable at all an authority against it. The only question before the court which seems applicable at all, was whether a perpetual franchise could be inferred from other powers or must be ex-

pressly granted. The court held that they must have for their support explicit permission. That it is not enough that the authority is convenient to them, but it must be indispensable to them.

Respondent's solicitors also cite (p. 6) in support of their contention of an implied contract, the case of Los Angeles vs. Los Angeles City Water Company, 177 U. S. 558. Why this case is cited we are at a loss to understand, for the court held at page 570-1, that inasmuch as there was an express contract it was not necessary to decide if there was an implied one, but stated the rule: That the power if not expressly given will not be presumed unless necessarily or fairly implied in, or incident to the other powers expressly given—not simply convenient, but indispensable to them.

A City Cannot be Bound by an Implied Contract where It can Only Act by Ordinance.

Respondent's solicitors (p 6) cite Dillon on Municipal corporations 4 Ed. Par. 459, as follows:

> "The present state of the authorities clearly justifies the opinion of Chancellor Kent, that corporations may be bound by implied contracts within the scope of their powers, to be adduced by inference from authorized corporate acts without either a vote or deed of writing."

If counsel had read the whole section and the one following, they would have discovered that the doctrine enunciated by the section taken as a whole is very different from that conveyed by the first part

of the paragraph. The portion of the paragraph following the portion quoted continues as follows:

> "This doctrine is equally applicable to public and private corporations, but in applying it however, care must be taken not to violate other principles of law. Thus it is obvious that an implied promise cannot be raised against a corporation when by its charter it can only contract in a prescribed way, except it be a promise for money received, or property appropriated under the contract."

Counsel for respondent do not contend that the council had any authority to grant its assignors any rights except by authority of the Acts of 1891, p. 60, quoted on page 3 of respondent's brief. By this law the council was only authorized to act by ordinance.

If appellant then could only contract in such matters by ordinance; and if it can be bound by an implied contract only for money received or property appropriated under the contract as is clearly laid down by Par. sec, 459 and 460; and as the implied contract contended for is neither for money received, or property appropriated under the contract, it follows very clearly, that such an implied contract cannot be invoked against appellant in this case.

A Case Not in Point.

Respondent's solicitors in their brief, (p 7) cite the case of Union Depot Co. vs. The Chicago K. & N. Ry. Co. 113 Mo. 213. In this case seven railroads each agreed to pay one-seventh of the operating expenses, and one-seventh of the interest on the cost of a union

depot, rentals from other roads to be credited on the rentals of the contracting roads. Some of the contracting roads extended through Kansas City, and others terminated there. The business of some of the roads transacted at the depot was much greater than the others. The court held construing the contract: That it was not the intention of the parties that a road purchasing another road and thereby extending it through Kansas City, should by reason of such purchase pay an additional rental. We fail to see how this case has any application to the case at bar

The Walla Walla Case Very Unlike the Case at Bar In Its Facts, Is so Far as It Is Applicable It Is Against the Contention of Respondent.

Respondent seems to place much reliance on the Walla Walla Case 172 U. S. 1. This case is so unlike the case at bar in its facts, that respondent cannot reasonably claim that it sustains its position, but on the contrary, the reasoning of the decision in respect to a monopoly is directly against that position. The Walla Walla case differs from the case at bar, in the following particulars:

1. The city of Walla Walla, expressly contracted not to build its own plant nor to engage in the business of furnishing water to itself or its citizens during the period of the franchise. The City of Joplin made no contract of this kind.

2 The town of Walla Walla, in the ordinance granting the franchise, expressly reserved unto the city the right to take, condemn and pay for the water-

works of the company at any time during the life of the franchise thereby preventing the creation of a monopoly. The ordinance in the case at bar, contains no such provision, and as the law gives the appellant city no such right, the ordinance, if defendant's position is correct, creates a most pernicious monopoly during the entire period of the franchise.

3. The ordinance in the Walla Walla case, makes most adequate provision for the entire supply of the city, and its citizens, and provides a forfeiture for their enforcement. The ordinance in the case at bar makes no provision for any electric lights either for the city or its citizens, during the period of the franchise, and no forfeiture to enforce any such provision. The only provision in the ordinance that even hints at such a thing, is the clause giving the grantees permission to place poles in the streets to properly suspend street lights, if the city should contract for such lights. This clause however, is only a provision regulating the erecting of poles, if a contract should be made with the city for street lights. It takes two parties to make a contract and the grantees, by refusing to make such contract, could defeat the clause authorizing them to set poles in the street.

4. In the Walla case the water company had expended $125,000 in building its plant, and laying its mains, which remained in the city to be taxed, whilst in the case at bar, the original grantees expended about $15,000, in building a plant in the city of Joplin, as required by Ordinance 441, but as soon as respondent became the assignee, it dismantled the plant and tore down the pole line, and moved all the machinery away from the city, and never since said time has it

ever maintained a plant for the purpose of generating electricity either in appellant city or its suburbs.

J. W. Freeman, witness for respondent, R. p. 154-7, testified in substance as follows:

> "That he was president of the Merchant's Light and Power Company, and obtained the franchise No. 441. That his company built the plant to generate electricity to supply the city of Joplin with electric lights, under that ordinance; and complied with all the provisions of that ordinance up to the time that they sold out in 1896 to the Southwest Mo. L. C. That before his company sold out it did commercial lighting but had no contract for public lighting. That after his company sold out to the S. W. Mo. Lt. Co., that company dismantled the plant built under Ordinance 441, and moved all the machinery away from Joplin, also tore down the pole line built under Ordinance No. 441, and transfered the wires to the pole line owned by the respondent company before the sale, and that since 1896 the Southwest Mo. Light Co. has maintained no plant within the city of Joplin to generate electricity to supply the city of Joplin with electric lights.

5. In the Walla Walla Case the company had never expressly repudiated the franchise upon which they based their suit, but at all times recognized it and claimed to be acting under it. Whilst in the case at bar, the respondent before it acquired ordinance number 441, was operating under ordinance number 98, (The Sergeant franchise) introduced in evidence by respondent (R. P. 129 and 130)

The Sergeant franchise was a better franchise for respondent, than Ordinance 441, because it was perpetual as to time, it permitted a higher charge for lights, it required the building or maintaining of no generating plant in the city, it required the maintenance of no free light, and it was in every particular more liberal to respondent than the franchise granted by Ordinance 441. For these reasons respondent after it became the assignee of Ordinance 441, not for the purpose of operating under it, because it had a better franchise as it thought, but to prevent competition, expressly repudiated Ordinance 441, and expressly refused to act under it or be bound by it, and never at any time recognized it until it made it the basis of this suit. The testimony upon this proposition is substantially as follows:

GEORGE T. BAYNE, (R. p's. 182 to 192.) testified that he was superintendent of respondent from July 1st, 1896 to June 30th, 1898. (Two years after respondent became the assignee of Ordinance 441,) and was succeeded by White as superintendent. That respondent had a better franchise, than the one granted by Ordinance 441, the Sergeant franchise, that it was much better for the company than Ordinance 441. that he never thought they would need the franchise granted by Ordinance 441, and for this reason he refused to be bound by it. That the officers of the city asked him to maintain the free light required by Ordinance 441, but as the Sergeant franchise did not require any light maintained free of charge, he refused to maintain it.

RECORD OF THE CITY of date Sept. 3, 1896 was introduced (R. p. 167) instructing the committee on fire, water and gas to confer with the Southwest Missouri Light Company and ascertain whether they would maintain a light as had the Merchants Electric Light Company in the past without charge to the city.

J. W. MOORE, (R. p. 193) testified substantially, as follows:

"That as chairman of the committee on fire, water and gas, he had seen Bayne, superintendent of the Light Co. and was informed by Mr. Bayne that the company did not feel themselves under obligations to maintain a light there, and that he so reported to the council on Sept. 16th, 1896. On cross-examination Moore testified. At the time he had this talk the light hung in the street. That the light had formerly been on Freeman's porch, that the way it came to be hung in the street. Freeman proposed if the City would furnish the poles, he would maintain a light in the Street."

(NOTE—Freeman was president and owned a large majority of the stock of the company that assigned Ordinance No. 441 to the Respondent) (see record p. 39.)

J. W. FREEMAN testified (R. p. 161)

"That this light has been on the front porch of his foundry, but some of the councilmen did not want a public light on private property, so his company agreed to maintain an arc light in the street if the city would furnish the poles. The

City furnished the poles, and the company moved the light into the street.

E. C. H Squire, on behalf of defendant, testified as follows: (R. p. 167)

"Q. Now turn to record 'D.' page 346, and read that part of date July 30th, 1897, relating to the establishing of a light at Fourteenth and Main streets. A. Mason presented the petition as follows: 'Joplin, Missouri, July 16, 1897—To the Honorable Mayor and Council of the City of Joplin, Missouri: We, the undersigned citizens and taxpayers of the City of Joplin, Missouri, respectfully petition your honorable body to have an arc light placed at the corner of Fourteenth and Main streets. The railroad crossing at this place creates a strong necessity for a light Signed, A. Knoche, G. W. Burgess, Philip Myers and seventy-seven others.'

"Q Now book 'D.' page 357, July 30, 1897. A. On motion of Lowry the petition for an arc light at Fourteenth and Main streets was referred to the committee on fire, water and gas with the power to act.

"Q. Turn to record 'D.' page 364 and read anything there referring to the electric light on Fourteenth and Main streets? A Moore, for the committee on fire, water and gas reported that they had ordered an arc light put up at Fourteenth and Main streets.

"Q. Are you familiar with the locality of Fourteenth and Main streets? A. Yes sir, tolerably so. (R. p. 168)

"Q. Is that the point referred to in Ordinance 441 requiring a light to be maintained on the front of Freeman's foundry? A. Freeman's foundry fronts right there on Fourteenth and Main streets, the front of the building would be at that point.

"Q. The front porch of Freeman's foundry is how far from the intersection of Fourteenth and Main streets. Is it at the northwest corner of Fourteenth and Main? A. It is the northwest corner of the intersection.

"Q. Then how does the railroad cross there? A. It crosses Main street north of the intersection of Fourteenth.

"Q. About how far? A. About twenty feet I should judge.

"Q. Then a light put up at the corner of Fourteenth and Main streets would light the crossing? A. Yes, sir.

"Q. Since you have been clerk has any light been maintained on the front porch of Freeman's foundry to light the Frisco crossing, or has any light been maintained near there by the Southwest Missouri Light Company free of charge so far as you know? A. So far as I know there has not. I am not very familiar with that part of town. That is, I don't go down there much. I think the city paid for the light at Fourteenth and Main since it was established. There was an increase of one light at that time that the city paid for. I am quite sure that was the light. I

don't know of any other light being ordered in." (R. P. 171).

Respondent offered no proof on this subject. George Myers, former general manager and witness for respondent stated on cross examination that he thought his company maintained the light free of charge as required by the ordinance, (R. p 81, 82) but at bottom of page 82, and top of page 83, admitted that he knew nothing about the matter.

A. Knoche testified substantially, as follows: (R. p. 199 200).

"That before Freeman sold out there was a light maintained on the front porch of his foundry to light the Frisco crossing. That it was kept burning for a time after the sale, and then for a year there was no light there. That he thought they were entitled to a light there, and went to Freeman and asked him about it and Freeman said he had nothing to do with it.

"That after the light was out nine or ten months he got up a petition to the council to establish a light there, and the city established one there within two weeks after he got up the petition. Witness also testified (bottom of page 200) that before Freeman sold out he made an arrangement with the city for the city to furnish the poles and Freeman would maintain an arc light in the street, that the light he had maintained on the porch was an incandescent light with a reflector, and that there was no room on the porch for an arc light. Witness said he thought there is a light on Freeman's porch yet, but he said this light

would not do the street any good, naturally Mr. Freeman would have hung lights around the front of his foundry, but a private light on the front of his foundry would not relieve the respondent of its duty to light the street crossing. There is no evidence that Freeman ever objected to respondent maintaining a light on the front of his foundry. Respondent did not object because the lamp was over the street. It refused to maintain the light because it was not operating under Ordinance 441, but under the Sargeant Franchise.

Thus it will be seen by the above testimony that the Merchant's or Freeman company maintained the light in compliance with ordinance until an arrangement was made to take it from the porch and put it over the street. That this light was maintained up to the sale, that after the sale the respondent not only refused to maintain the light either on the porch or in the street, but repudiated the ordinance itself, and has never maintained any light at either place since.

Mr. Knoche said (R. p. 201) that he thought there was a light on the porch at the time he testified, but neither this witness or any other witness testified that respondent ever maintained it or offered to maintain any such light at any place, either in the streets or on the porch.

Respondent's council in their brief seem to rely most upon that part of the opinion in the Walla Walla case, which states; that an agreement by the city not to build its own plant and compete with the water

company was but a natural incident to the main purpose of the contract.

This attempt to apply the reasoning of the Walla Walla case to the case at bar illustrates the unfairness of attempting to make such application where the two cases are so dissimilar in their facts. In the Walla Walla case, the ordinance provided that the company should furnish, and the city should take from it all the water the city would need for all purposes during the life of the franchise.

This was one method of contracting that the city would not obtain such supply from any other source.

If a state should contract to sell a certain piece of land to A., a subsequent contract to sell the same land to B, would be just as much an impairment of the first contract, as if it had contained a clause that the state would not sell it to B. The contract to sell the land to A., was a contract not only not to sell it to B., but also, not to sell it to any other person. After the city of Walla Walla had agreed to take its entire supply for a specified time from the water company, an agreement not to build its own plant, added nothing to the contract already made.

If a laborer should contract his whole time for a month to A., he thereby contracts not to labor for another during that time.

If an actor should agree to act at a certain theatre for a given time, he thereby contracts not to act at another theatre during the same time.

It is hardly necessary to invoke the doctrine applicable to implied contracts to these cases, because

they are really express contracts. The words of a contract are only used to express the intentions of the parties, and this may be done as well by agreeing to take one's whole supply of an article, from A., as by agreeing not to obtain such supply from any other person. Inasmuch as the city in the case at bar agreed to take no lights from the respondent, and the respondent made no contract binding it to furnish any, the above reasoning can have no possible application to this case.

Estoppel Cannot Be Invoked Against Appellant.

On pages 10 and 11 of respondent's brief the doctrine of estoppel is claimed against appellant city. It is contended that for a period of ten years after the passage of Ordinance 441, the city maintained contract relations with the original grantors, and with respondent as its successor; and that it continually acquiesced in the relations between the light company and its citizens, and acquiesced in the expenditure of large sum of money in the enlargement of its plant to meet the growing needs of the city.

An examination of the evidence will determine if this claim has any foundation in fact.

> J. W. Freeman witness for respondent testified (R. p. 154,) that before his company sold out to respondent, his company never had any contract with the city to light its streets.

This disposes of any contract relation before the sale. After the sale, the only contract made with re-

spondent was a temporary contract for four months to furnish street lights while the city light plant was being constructed, (See R p. 37). Before this contract was made the city had been notified as shown above that respondent was not operating under Ordinance No. 441, but under the Sargeant franchise which is not made the basis of this action, so that it could not be said that even this temporary contract was made under ordinance 441.

The contract previous to this (R p. 34) was a contract entered into between the city of Joplin and another company, not respondent, the Southwest Electric Light and Water Power Company, the company that sold out to respondent. It operated under the Sergeant franchise and had its plant at Grand Falls. The contract was dated Feb. 21, 1894, to furnish street lights to the City of Joplin, from May 1st, 1894, to May 1st, 1899.

Now as to expenditure of money. All the money expended at Grand Falls before respondent purchased the franchise granted by Ordinance No. 441, such as building a dam, a generating plant and an auxiliary steam plant, was spent under the Sergeant franchise and not under Ordinance 441 at all, it was spent miles away from the City of Joplin and in another county. This company had a pole line built under the Sergeant franchise and as soon as it acquired the franchise granted under Ordinance No. 441, respondent dismantled and tore down the plant and pole line built under Ordinance 441, so that nothing remains of any plant or pole line built under Ordinance 441. All that has been expended by respondent since it acquired Ordinance 441, has been expended by it on

its plant and pole line built under another franchise entirely. Again. All moneys expended in the city in such additions after respondent acquired Ordinance 441, were expended after notice to the city that respondent was not operating under Ordinance 441, but under the Sergeant franchise, and the city never has any other notice until this ordinance was made the basis of this suit. Then how could appellant city be said to acquiesce in the expenditure of money under Ordinance 441 when the only notice it had was that respondent was not acting under that ordinance.

As to moneys expended in improving respondent's plant at Grand Falls, after respondent purchased, the franchise granted by Ordinance No. 441, it was expended after notice to appellant that respondent was operating under the Sergeant franchise which did not require any generating plant to be built or maintained within the city of Joplin. And further; this generating plant was located out of the city of Joplin and was improved for the purpose of furnishing lights to Webb City and Carterville under franchises obtained from those cities.

George M. Myers, former superintendent and witness for respondent testified as follows: (R p. 51)

"Q. Where is the machinery or power plant of the company located with reference to the city of Joplin? A. The power machinery is located at what is called Grand Falls in Newton County.

"Q. How far, and in what direction from the city of Joplin? A. It is about four and three

quarter miles—I think it is about southwest as near as I can remember.

* * * * * * * *

"Q. Did the property of the company extend beyond the city of Joplin to other cities? A. Yes sir.

"Q. To what other cities? A. To Webb City and Carterville.

"Q. How was that connection made, by poles and wires strung on poles. A. Yes sir.

"Q. Did the company have any property or appliances for furnishing light in the two last named cities of Webb City and Carterville? A. Yes sir.

The same witness testified on cross examination (R. p. 73) That Carterville is an independent city by itself situated about six miles from Joplin, and Webb City is an independent city by itself situate about six miles from Joplin, that each corporation is independent and separate from each other and that the property the company had in those cities were operated under rights respondent had obtained from those cities, operated under franchises owned in those cities, and that the doing of commercial lighting in the city of Joplin, would not interfere with respondent's properties or light service in either of those cities; that part of the machinery of respondent at Grand Falls was for the purpose of supplying Webb City and Carterville, and that the pole line of respondent for supplying Webb City and Carterville

runs from Grand Falls to Carterville through the city of Joplin. (R. p. 76) The city of Joplin is in Jasper County, and Grand Falls is in Newton County.

Now as to the claim that appellant acquiesced in respondent and its assignor furnishing commercial lights to the citizens of Joplin.

Before the sale to respondent, of Ordinance 441, the grantee company maintained its generating plant in the city of Joplin, maintained the light free of charge, and complied with all the provisions of Ordinance 441, so that up to that time there was no acquiescence in any failure to comply with such ordinance. As we have already seen, respondent immediately after it became the assignee of that franchise, notified appellant that it was not acting under, and would not be bound by that ordinance. How then can it be claimed that the appellant city acquiesced in respondent's failure to comply with the provisions of that ordinance whilst furnishing lights to its citizens? Respondent owned the Sergeant franchise, it required the maintenance of no free light, it required the building and maintaining of no generating plant in the city of Joplin, appellant could not dictate that respondent should operate under any particular franchise. Respondent owned both franchises, and it could operate under either one or both at its option. Respondent elected to repudiate Ordinance No 441, and operate under the Sergeant franchise. Appellant city protested against such action, but its protests were of no avail.

Again, how can appellant be estopped by reason of doing or not doing any act with reference to the

building of an electric light plant, constructed in another county, to supply two independent cities?

But outside of all this the city did no act, and made no contract inconsistent with any subsequent act of appellant. Appellant did nothing to induce respondent to change its position.

The doctrine of estoppel does apply in this case, but it applies against respondent, not against appellant.

Respondent cannot repudiate all the obligations of Ordinance 441, give notice that it is not acting under it and will not be bound by it, for years, and then when it is thought that it furnishes a better basis for an injunction suit, than does the Sergeant franchise, elect for the first time to avail itself of its provisions.

It may be urged that Superintendents Bayne and White, were not authorized to repudiate Ordinance 441. (Fillmore witness for respondent testified R. p. 146, that superintendent White would not admit that respondent was operating under the franchise granted by Ordinance 441, called the Merchant's franchise.) If such want of authority can be urged as an excuse, any corporation can by its superintendents, its active managers, repudiate any contract for years, and then prevent an estoppel by asserting that such superintendents were acting without authority. In this case, however, after appellant's answer was filed, (R. p. 18) alleging respondent's failure to maintain the light free of charge as required by Ordinance 441, respondent made no offer to comply with said ordinance, or maintain said light.

George M. Myers, witness for respondent (R. p. 81) testified:

> "A. I don't think they are maintaining it now. They are not maintaining any lights down there now for the city.

City Could Not Regulate Rates to be Charged By Lighting Company.

Counsel for respondent in their brief (P. 4) says;

> "The ordinance fixed the maximum price of lights, and specified the kinds, the statute provides that the city may prescribe and regulate the rates to be paid by the consumers."

This statement is certainly missleading. In the connection used it conveys the idea that the appellant city had the right to regulate the rates, to be paid by consumers to the respondent company. The paragraph quoted seems to have been taken from the statute set out on page three of their brief. This statute refers to lights furnished by the city and has no reference to lights furnished by a private company. The writers have made a thorough search up to the time respondent filed its brief, and have been unable to find any provision in the charter of cities of the third class, or in the general law, authorizing the appellant city to regulate the rates to be charged by lighting companies.

Ordinance 441 Was Passed to Obtain Competition and To Obtain Lights Generated at a Plant Located in the City.

Respondent has no right to object to competition whilst claiming to operate under Ordinance 441, because that was one of the main purposes of the passage of that ordinance.

One of the prominent cannons of construction in determining the meaning of contracts and legislative enactments is to consider all the surroundings of the parties, and the object to be attained by the making of the contract, or the passage of the law.

At the time Ordinance 441 was passed, a gas company was engaged in furnishing commerical gas lights in the city of Joplin, and had been for some twenty years before that time. The Sergeant franchise had been passed years before, and the company which preceded respondent was at that very time and had been for years furnishing electric street lights and commercial electric lights in the city of Joplin. An electric light franchise had been granted to the gas company, but it had not done much under it. The lights furnished by the predecessor of respondent with its plant at Grand Falls, were not satisfactory, and instead of getting better, the lights got worse. (R. p. 142, 143, also see evidence of Squire, McDonald, Moore, and Knoche.)

This was the condition of affairs when a company of merchants and business men applied for and obtained the franchise granted by Ordinance 441. The

partnership adopted the name of Merchant's Electric Light and Motor Company, and afterwards incorporated under the same name. The purpose and object of Ordinance 441, was not to furnish electric lights inthe city of Joplin, the city already had such lights, but to organize a light company which would compete with the company then operating at Grand Falls, the predecessor of respondent, and, to obtain lights from a plant located in the city. This was the evident purpose of the city in granting the franchise and the grantees in obtaining it, as evidenced by the franchise itself, as it only grants permission to vend electric lights which are generated in the city and required the building and completion of such plant in the city.

Ordinance 441 relied on in this case in these particulars is very unlike the ordinance relied on in the Walla case. Ordinance 441 was passed to obtain competition, the ordinance in the Walla Walla case was passed to obtain a supply of water and contained an express contract against all competition.

The above company of merchants erected a generating plant in the city, maintained the light free of charge and complied with all the requirements of Ordinance 441 until it sold out to respondent on the 9th day of June, 1896. As soon as respondent secured control, it dismantled the plant, took down the pole line and refused to act under Ordinance 441, or in any manner to be bound by its provisions. The circumstances all show that respondent purchased the franchise and plant of the merchant's company to get it out of business, not because it needed it. It had a plant. It had a pole line. It had no use for either. After being dismantled and torn up, it had no value ex-

cept for second hand machinery, poles and wires. It had no use for the franchise because it had a better one. This fact is made more prominent by the contract of sale made with Merchant's Company (R. p,46) in which all the stockholders of the Merchant's Company agreed not to engage in the lighting business in the city of Joplin for a period of ten years from and after June 1st, 1896.

After respondent had thus violated t e terms of, and repudiated Ordinance 441, all the objects sought to be attained by both grantors and grantees in the passage of that ordinance had failed. There was no competition in the lighting business, and the city was not supplied from any plant located in the city. In addition to this, no satisfactory electric lights could be obtained either by the city or its citizens. This condition of affairs continued for some time, when the city was at last forced to build its own light plant.

Respondent's solicitors cite a number of cases which they contend sustain their doctrine of an implied contract, but an examination of such cases will disclose that in all of them, there was some provision of exclusive right upon which they turned, and not upon any implied contract contended for in this case. The decisions of this court seem all againt such contention. The doctrine contended for seems to be supported neither by the decisions of the courts nor by reason. Respectfully submitted.

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